TENAGA NASIONAL BHD v. MAYARIA SDN BHD & ANOR

COURT OF APPEAL, PUTRAJAYA
LIM YEE LAN JCA
BADARIAH SAHAMID JCA
HARMINDAR SINGH DHALIWAL JCA
[CIVIL APPEAL NO: W-02(IM)(NCVC)-1077-07-2015]
12 NOVEMBER 2018

UTILITIES: *Electricity supply – Disconnection – Discovery of meter-tampering at customer's premises – Tampered meter removed and replaced with new one – Electricity supplier sent notice of demand for re-calculated quantum of losses of revenue and statutory notice to disconnect electricity supply at premises – Whether notice of demand good in law and valid – Whether electricity supplier entitled to disconnect consumer's electricity supply – Whether electricity supplier suffered further losses after replacement of tampered meter – Whether electricity supplier could claim amount owing through civil proceedings only – Electricity Supply Act 1990, s. 38(1), (2), (3) & (5)*

The first respondent ('first plaintiff'), a hotel owner, was the customer of the appellant, Tenaga Nasional Berhad ('TNB'). Upon discovery of meter-tampering at the hotel, TNB's employees proceeded to remove the tampered meter and replace the same with a new meter. The first plaintiff continued to be billed for electricity consumed, as recorded by the new meter. After a re-calculation of the quantum of loss of revenue due to the under-billing of the hotel account, TNB arrived at the sum of RM1,100,350.98 ('the sum'). Two months and 20 days after the inspection and removal and replacement of the tampered meter, TNB issued (i) a notice of demand which stated that, unless the sum was paid to TNB, the supply of electricity at the hotel would be disconnected on 21 October 2009; and (ii) a statutory notice, under s. 38(1) of the Electricity Supply Act 1990 ('Act'), which stated that the supply of electricity would be disconnected on 21 October 2009 ('notices'). The first plaintiff paid the sum to TNB without prejudice to the rights of the hotel. The first plaintiff and the second respondent ('second plaintiff') commenced an action at the High Court, (i) challenging the validity of the notices; and (ii) seeking a refund of the sum paid to TNB. TNB counterclaimed for a declaration that the sum paid was lawfully claimed pursuant to s. 38(3) of the Act. In allowing the plaintiffs' claim and dismissing TNB's counterclaim, the Judicial Commissioner ('JC') held that (i) on the issue of replacement/rectification of the tampered meter, TNB was not entitled to disconnect electricity supply; (ii) on the validity of the notice of demand, TNB's notice to disconnect electricity supply on default of the outstanding amount due was unlawful as the amount was recoverable by a civil action in court; and (iii) the notice of demand, which threatened the plaintiffs with the disconnection of electricity supply in the event of non-payment, was bad in law and invalid. Hence, the present appeal by TNB on the grounds that (i) the JC erred in his interpretation of TNB's statutory

powers under s. 38(1) of the Act. The language of s. 38(1) of the Act is plain and unambiguous and therefore, Legislative intention is clear and must be given effect to; (ii) the JC erred in his finding that the notices were bad in law as it was clear that, under s. 38(3) of the Act, TNB was entitled to require the consumer to pay for the losses of revenue and any expenses incurred by TNB as a result of meter-tampering; and (iii) the Act does not limit the right of TNB to claim the amount owing through civil proceedings only as, alternatively, the Act empowers TNB to claim for losses of revenue by way of a civil action in court pursuant to s. 38(5) of the Act ('TNB's contention').

Held (dismissing appeal; affirming decision of High Court)
Per Badariah Sahamid JCA delivering the judgment of the court:

(1) Although s. 38(1) of the Act empowers TNB to disconnect electricity supply, s. 38(2) provides that the disconnection of electricity by TNB shall not exceed three months. A reading of s. 38(1) and (3) demonstrated that the power given to TNB, by s. 38(1), is to limit any loss suffered by TNB by an under-billing of electricity consumption. The JC had correctly construed s. 38(1) and (3) of the Act, by adopting the purposive approach where the purpose and intent of the Act shall be considered in construing the meaning of the provisions of the Act. In the present case, there was no issue of further losses as TNB had already replaced the alleged tampered meter three months prior to the issuance of the notices. There had been no offence committed after three months of the replacement of the tampered meter. TNB had no authority to disconnect electricity supply or to terminate electricity supply in the event the payment of sum was not made within 24 hours of the issuance of the notice. Section 38(1) and (3) do not authorise TNB to do so. (paras 32 & 34)

(2) Section 38(2) of the Act stipulates that, even in circumstances where TNB is empowered to disconnect the supply of electricity, the period of disconnection is expressly limited to a period not in excess of three months. In the event that TNB had already halted any further potential losses by rectification of the defective meter or installation of a new meter, the purpose, which was to prevent further losses to TNB, had already been achieved. What did TNB seek to achieve by taking action to disconnect the electricity supply? The answer that came to mind was to punish the errant consumer and perhaps as a deterrent to the consumer, as well as other like-minded consumers, who might be tempted to commit such offences. For TNB to take such approach was entirely inconsistent with the objective of the Act. (paras 39-41)

(3) Electricity is a basic necessity and any disruption of electricity supply would result in adverse, even dire consequences for the consumer. Great personal and economic hardships were caused by a prolonged disruption of electricity supply. The instant case was an example in point. The first plaintiff operated a hotel in which the continued supply of electricity

was a necessity. Any disruption in supply of electricity, particularly a prolonged disruption, would lead to losses in business as well as potential lawsuits by the hotel's customers. (para 42)

(4) If TNB's contention was accepted, it would mean that the purpose of a disconnection of electricity supply, under the Act, goes beyond arresting potential future losses of revenue to TNB and is extended to punish errant consumers who commit offences as well as a threat by TNB to compel such consumers to pay outstanding sums without the necessity of instituting a civil action in court. This would be inconsistent with the express and clear provisions of the Act. The notice of demand, issued under s. 38(3) of the Act, was bad in law in that the sole purpose of its issuance was to threaten the plaintiffs that electricity supply would be terminated in the event the amount claimed by TNB was not paid within 24 hours. This was never intended by the Act which requires a civil action be brought for payment, as provided under s. 38(5) of the Act. (paras 46 & 47)

Bahasa Malaysia *Headnotes*

Responden pertama ('plaintif pertama'), pemilik sebuah hotel, ialah pelanggan perayu, Tenaga Nasional Berhad ('TNB'). Selepas menemui usikan meter di hotel, pekerja-pekerja TNB seterusnya membuka meter tersebut dan menggantikannya dengan meter baharu. Plaintif pertama terus dicaj untuk penggunaan elektrik, seperti yang direkodkan oleh meter baharu ini. Selepas pengiraan semula kuantum kerugian hasil akibat kekurangan caj akaun hotel, TNB mencapai jumlah RM1,100,350.98 ('jumlah tersebut'). Dua bulan dan 20 hari selepas pemeriksaan dan pembukaan dan penggantian meter yang diusik, TNB mengeluarkan (i) notis tuntutan yang menyatakan, kecuali jika jumlah tersebut dibayar kepada TNB, bekalan elektrik di hotel akan dipotong pada 21 Oktober 2009; dan (ii) notis statutori, bawah s. 38(1) Akta Bekalan Elektrik 1990 ('Akta'), yang menyatakan bekalan elektrik akan dipotong pada 21 Oktober 2009 ('notis-notis'). Plaintif membayar jumlah tersebut kepada TNB tanpa prejudis terhadap hak-hak hotel. Plaintif pertama dan responden kedua ('plaintif kedua') memulakan satu tindakan di Mahkamah Tinggi, (i) mencabar kesahan notis-notis; dan (ii) memohon pemulangan semula jumlah yang dibayar kepada TNB. TNB menuntut balas pengisytiharan bahawa jumlah yang dibayar dituntut secara sah bawah s. 38(3) Akta. Membenarkan tuntutan plaintif-plaintif dan menolak tuntutan balas TNB, Pesuruhjaya Kehakiman ('PK') memutuskan (i) tentang isu penggantian/pembaikan meter yang diusik. TNB tidak berhak memotong bekalan elektrik; (ii) tentang kesahan notis tuntutan, notis TNB untuk memotong bekalan elektrik, susulan kegagalan membayar jumlah tertunggak, tidak sah kerana jumlah tersebut boleh diperoleh semula melalui tindakan sivil di mahkamah; dan (iii) notis tuntutan tersebut, yang mengugut plaintif-plaintif dengan pemotongan bekalan elektrik jika tidak membayarnya, tidak sah dan tidak sah bawah undang-undang. Maka timbul rayuan ini oleh TNB atas alasan (i) PK terkhilaf dalam tafsiran beliau terhadap kuasa-kuasa TNB

bawah s. 38(1) Akta. Bahasa s. 38(1) Akta jelas dan tidak kabur, dan dengan itu, niat Badan Perundangan jelas dan mesti dikuatkuasakan; (ii) PK terkhilaf dalam dapatan beliau bahawa notis-notis tersebut tidak sah kerana jelas bahawa, bawah s. 38(3) Akta, TNB berhak mengkehendaki konsumer membayar kerugian hasil dan apa-apa perbelanjaan yang dikeluarkan oleh TNB akibat usikan meter; dan (iii) Akta tidak mengehadkan hak TNB menuntut jumlah terhutang melalui prosiding sivil sahaja kerana, secara alternatif, Akta memberi kuasa kepada TNB untuk menuntut kerugian hasil melalui tindakan sivil di mahkamah, bawah s. 38(5) Akta ('hujahan TNB')

Diputuskan (menolak rayuan, mengesahkan keputusan Mahkamah Tinggi) Oleh Badariah Sahamid HMR menyampaikan penghakiman mahkamah:

(1) Walaupun s. 38(1) Akta memberi kuasa kepada TNB memotong bekalan elektrik, s. 38(2) memperuntukkan bahawa pemotongan bekalan elektrik oleh TNB tidak boleh melebihi tiga bulan. Bacaan s. 38(1) dan (3) menunjukkan kuasa yang diberi kepada TNB, oleh s. 38(1), mengehadkan apa-apa kerugian oleh TNB akibat kekurangan caj penggunaan elektrik. Pesuruhjaya Kehakiman mentafsir s. 38(1) dan (3) Akta dengan betul, dengan mengguna pakai pendekatan bertujuan iaitu tujuan dan niat Akta akan dipertimbangkan dalam mentafsir makna peruntukan-peruntukan Akta. Dalam kes ini, tiada isu kerugian lanjut kerana TNB telah menggantikan meter yang dikatakan diusik tiga bulan sebelum pengeluaran notis-notis. Tiada kesalahan yang dibuat selepas tiga bulan menggantikan meter yang diusik. TNB tiada kuasa memotong bekalan elektrik atau menamatkan bekalan elektrik jika jumlah tersebut tidak dibayar dalam masa 24 jam selepas pengeluaran notis. Seksyen 28(1) dan (3) tidak memberi kuasa kepada TNB untuk berbuat demikian.

(2) Seksyen 38(2) memperuntukkan bahawa, jika pun dalam hal-hal keadaan TNB mempunyai kuasa memotong bekalan elektrik, tempoh pemotongan jelas dihadkan pada tempoh tidak melebihi tiga bulan. Jika TNB menghentikan apa-apa potensi kerugian melalui pembaikan meter cacat atau pemasangan meter baharu, tujuannya, iaitu menghalang kerugian lanjut pada TNB, sudah tercapai. Apakah yang TNB ingin capai dengan mengambil tindakan memotong bekalan elektrik? Jawapannya ialah untuk menghukum konsumer yang menyeleweng, dan konsumer-konsumer berfikiran serupa, yang mungkin ingin melakukan kesalahan sama. Dengan mengambil pendekatan sedemikian, TNB bertindak bercanggah sama sekali dengan objektif Akta.

(3) Elektrik satu keperluan asas dan apa-apa gangguan bekalan elektrik akan menyebabkan kesan buruk, bahkan kerumitan pada konsumer. Kesusahan besar peribadi dan ekonomi berlaku akibat gangguan bekalan elektrik berpanjangan. Kes ini adalah contohnya. Plaintif pertama mengendalikan sebuah hotel yang bekalan berterusan elektrik satu keperluan. Apa-apa gangguan bekalan elektrik, khususnya gangguan berpanjangan, akan menyebabkan kerugian pada perniagaan dan berpotensi mengundang tindakan guaman oleh pelanggan-pelanggan hotel.

(4) Jika hujahan TNB diterima, ini bermakna tujuan pemotongan bekalan elektrik, bawah Akta, melangkaui mendapatkan potensi kerugian hasil masa hadapan untuk TNB dan diluaskan pada menghukum konsumer-konsumer yang menyeleweng yang melakukan kesalahan serupa dan satu ugutan oleh TNB untuk memaksa konsumer-konsumer tersebut membayar jumlah tertunggak tanpa keperluan memulakan satu tindakan sivil di mahkamah. Ini bercanggah dengan peruntukan nyata dan jelas Akta. Notis tuntutan, yang dikeluarkan bawah s. 38(3) Akta, tidak sah bawah undang-undang kerana tujuan utama pengeluarannya ialah mengugut plaintif-plaintif bahawa bekalan elektrik akan ditamatkan jika jumlah yang dituntut oleh TNB tidak dibayar dalam masa 24 jam. Ini tidak pernah diniatkan oleh Akta, yang mengkehendaki satu tindakan sivil dimulakan demi bayaran, seperti yang diperuntukkan bawah s. 38(5) Akta.

Case(s) referred to:

Claybricks & Tiles Sdn Bhd v. Tenaga Nasional Bhd [2006] 4 CLJ 892 CA ***(refd)***

Modernria Plastic Industries (M) Sdn Bhd v. Tenaga Nasional Bhd [2015] 3 CLJ 825 HC ***(refd)***

Tenaga Nasional Bhd v. Ong See Teong & Anor [2010] 2 CLJ 1 FC ***(refd)***

WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 42

Electricity Supply Act 1990, ss. 13, 37(1), (3), (14), 38(1), (2), (3), (5)

Interpretation Acts 1948 and 1967, s. 17A

Rules of Court 2012, O. 14A

For the appellants - Raja Ahmad Mohzanuddin Shah Raja Mohzan & Nur Fardhiah Mohd Nawawi; M/s Azmi & Assocs

For the respondents - Kalearasu K Veloo; M/s SF Chan & Co

[Editor's note: For the High Court judgment, please see Mayaria Sdn Bhd & Anor v. Tenaga Nasional Bhd [2015] 6 CLJ 788 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Badariah Sahamid JCA:

Introduction

[1] This is an appeal against the decision of the learned Judicial Commissioner (JC) of the High Court at Kuala Lumpur delivered on 29 May 2015, allowing the plaintiffs' claim with costs of RM15,000 and dismissing the defendant's counterclaim with no order as to costs.

Background Facts

[2] For ease of reference, parties will be referred to as they were in proceedings before the High Court.

[3] A summary of the background facts is derived primarily from the learned JC's 'grounds of judgment'.

[4] Tenaga Nasional Berhad ('TNB'), the defendant in this action, is the sole provider of electricity in Peninsular Malaysia. TNB is a licensee under the Electricity Supply Act 1990 ('the Act') with statutory powers to take action for offences committed under the Act, in particular for the tampering of TNB's meters and the theft or pilferage of electricity.

[5] The first plaintiff is a customer of TNB and the owner of a hotel known as Good Hope Hotel ('the hotel') situated on the first plaintiff's premises at PTD 19887, No. 1, Jalan Ronggeng 5, Taman Skudai Baru, Skudai, Johor Baharu.

[6] Pursuant to a contract for the supply of electricity and the provisions of the Act, TNB supplied electricity to the hotel. At all material times, the second plaintiff leased and operated the hotel and made payments of the electricity bills issued by TNB. At the High Court, the learned JC referred to the first and second plaintiffs collectively as "the hotel".

[7] The salient facts which have given rise to this action may be briefly stated as follows. On 30 July 2009, the defendant's employees carried out an inspection of the meter installation at the premises of the hotel, and discovered that there had been tampering of the meter. As a consequence, the meter did not properly record the actual amount of electricity consumed by the hotel. This had resulted in a lower calculation of the use of electricity than the actual usage.

[8] In the circumstances, in accordance with the defendant's standard procedure, on the same day of the discovery of the tampering, the defendant's employees proceeded to dismantle and remove the tampered meter and replaced it with a new meter. Thereafter, the first plaintiff continued to be billed for electricity consumed as recorded by the new meter.

[9] Subsequently, the defendant did a recalculation of the quantum of loss of revenue due to the under-billing of the hotel account with the defendant. According to the defendant's recalculation, the loss of revenue due to the meter tampering was in the amount of RM1,100,350.98.

[10] On conclusion of the recalculation, the defendant issued a notice of demand dated 20 October 2009, ('the notice of demand') stating that unless the sum of RM1,100,350.98 is paid to the defendant within 24 hours, the supply of electricity would be disconnected on 21 October 2009.

[11] Apart from the notice of demand, the defendant also issued the statutory notice dated 20 October 2009 under s. 38(1) of the Act ('the notice of disconnection') which states that the supply of electricity would be disconnected on 21 October 2009.

[12] Both the notice of demand and the notice of disconnection were issued about two months and 20 days after the initial inspection and removal and replacement of the tampered meter.

[13] It was not in dispute that when these notices were issued, there was no longer any issue of meter tampering as the tampered meter had been replaced by a new meter by the defendant's employees.

[14] In response, by its solicitor's letter dated 20 October 2009, the first plaintiff denied that there was any tampering of the meter as stated in the defendant's notice of disconnection, and further refused to pay the amount of RM1,100,350.98 as demanded by the defendant's notice of demand.

[15] By its letter dated 12 November 2009 addressed to the solicitors of the hotel, the defendant informed them that the defendant had strong evidence of meter tampering which justified the issuance of both the notice of demand and notice of disconnection. Further, the defendant gave notice to the hotel to pay the amount stated in the notice of demand within 14 days, failing which the defendant will disconnect the electricity supply to the hotel.

[16] On 19 November 2009, the first plaintiff paid the said sum of RM1,100,350.98 to the defendant. The payment was made without prejudice to the rights of the hotel.

Plaintiffs' Claim And TNB's Counterclaim

[17] The plaintiffs have challenged the validity of the notice of demand and the notice of disconnection and have prayed for a refund of the sum of RM1,100,350.98 which had been paid to the defendant on 19 November 2009.

[18] In response the defendant has counterclaimed for a declaration that the said sum of RM1,100,350.98 paid by the plaintiffs was lawfully claimed by the defendant under s. 38(3) of the Act.

[19] At the High Court, the parties to this suit agreed that the matter can be determined without a full trial and proceeded with the suit for a determination under O. 14A of the Rules of Court 2012 on the basis that:

(a) the questions are suitable for determination without a full trial of the action; and

(b) such determination will finally determine the entire cause or matter or any claim or issue therein.

The Agreed Issues

[20] The learned JC had framed the agreed issues for summary disposal of this suit under O. 14A of the Rules of Court 2012 as follows:

First Issue

Whether upon an inspection conducted by TNB's officials on 30 July 2009 and discovery by the said officials that an offence under s. 37 of the Electricity Supply Act 1990 ('the Act') had been committed by reason of the unauthorised items being connected to the metering installation at the first plaintiff's premises known as Good Hope Hotel,

and upon immediate removal of the unauthorised items by the said officials and thereby rectifying the metering installation, it is lawful for TNB to thereafter issue the notice of disconnection under s. 38(1) of the Act which states that the supply of electricity would be disconnected on 21 October 2009.

Second Issue

Whether upon an inspection conducted by TNB's officials on 30 July 2009 and discovery by the said officials that an offence under s. 37 of the Act had been committed by reason of the unauthorised items being connected to the metering installation at the first plaintiff's premises known as Good Hope Hotel, and upon immediate removal of the unauthorised items by the said official, it is lawful for TNB to invoke s. 38(3) of the Act and issue the notice of demand stating that unless the sum of RM1,100,350.98 (as loss of revenue due to the offence under s. 37 of the Act) is paid to TNB within 24 hours, the supply of electricity would be disconnected on 21 October 2009.

Findings And Decision Of The High Court

[21] In respect of the first issue abovementioned, the learned JC held that on the replacement or rectification of a tampered meter, the defendant is not entitled to disconnect electricity supply. The learned JC had stated as follows:

> … once the impugned meter has been replaced and the offence under section 37 of the Act is no longer extant, then there is no power to issue the Notice to Disconnect as the act of replacing the impugned meter with a new meter had brought the nefarious conduct or activity to an end and there is no longer a basis or justification for disconnection of electricity as a statutorily prescribed response to an offence under section 37 of the Act.

[22] In support of the above, the learned JC had also referred to his own decision in the case of *Modernria Plastic Industries (M) Sdn Bhd v. Tenaga Nasional Berhad* [2015] 3 CLJ 825 which dealt with a similar issue of whether a notice to disconnect the supply of electricity under s. 38(1) of the Act can be issued when the offence of tampering or pilferage of electricity under s. 37(1), (3) and (14) of the Act no longer exists. Reference was also made to the decision of this court in *Claybricks & Tiles Sdn Bhd v. Tenaga Nasional Bhd* [2006] 4 CLJ 892 CA and the Federal Court decision in *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478 FC. In *Modernia*'s case the basis for the decision was stated thus:

> In this regard it is clear from the judgment of the Court of Appeal in *Claybricks* and the judgment of the Federal Court in *WRP Asia Pacific* that the power under s. 38(1) of the Act is necessary to ensure that TNB is able to immediately sever electricity supply to avoid further illegal usage by the perpetrator. Quite clearly on the facts of the present case, there is no longer any illegal usage by the consumer such as to warrant the invoking of the power to disconnect under s. 38(1) of the Act. In this regard it should be emphasised that and borne in mind that the power to disconnect the supply of electricity is a power of limited duration and not a power to deprive the consumer of electricity in perpetuity.

[23] In respect of the second issue abovementioned on the validity of the notice of demand issued under s. 38(1) of the Act stating that unless the sum of RM1,00,50.98 be paid to TNB within 24 hours, the supply of electricity would be disconnected on 21 October 2009, the learned JC was of the view that TNB's notice to disconnect electricity supply on default of the outstanding amount due was unlawful as the said amount was recoverable by a civil action in court. In support of the abovementioned position, the learned JC had referred to sub-s. (5) of s. 38 of the Act which provides as follows:

> (5) The amount stated in the written statement shall, within the period specified in the statement, be due and payable to the licensee and in default of payment such amount shall be recoverable by civil action in a court.
>
> It is clear that TNB's recourse for recovery of loss of revenue is by way of civil action. As such, looking at these statutory provisions, I find nothing in them that allow TNB to utilise the power of disconnection under section 38(1) of the Act as a means to demand for payment of the amount which constitutes loss of revenue. If the loss of revenue is to be recovered, then that should be pursued by way of civil action in court in the ordinary way.

[24] The learned JC held that the notice of demand which threatened the plaintiffs with the disconnection of electricity supply in the event of the non-payment, was bad in law and therefore invalid. Thus, the learned JC allowed the plaintiffs' claim against the defendant, TNB with costs. TNB has appealed against the learned JC's decision.

The Appellant's Submissions

[25] The appellant's grounds of appeal before us may be summarised as follows: The learned JC had erred in his interpretation of TNB's statutory powers under s. 38(1) of the Act. The language of s. 38(1) of the Act is plain and unambiguous and therefore legislative intention is clear and must be given effect to. Section 38(1) provides as follows:

> (1) Where any person employed by a licensee finds upon any premises evidence which in his opinion proves that an offence has been committed under section 37(1), 37 (3), or 37 (14), the licensee may, upon giving not less than twenty-four hours' notice, in such form as may be prescribed, cause the supply of electricity to be disconnected from the said premises.

[26] The prior requisites for disconnection under s. 38(1) of the Act is a subjective finding of tampering by TNB's employee and an issuance of a 24 hours' notice. There are no other statutory requirements stipulated in the section. Thus, the learned JC had erred in arriving at the finding that a purposive interpretation of s. 38(1) is required and supported by the cases of *Claybricks & Tiles Sdn Bhd v. Tenaga Nasional Bhd* [2006] 4 CLJ 892 CA and the Federal Court decision in *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478 FC. Both the cases abovementioned had adopted the literal approach to the interpretation of s. 38(1) of the Act.

[27] In addition, the learned JC had erred in his finding that the notice of demand to pay the sum owing together with the notice of disconnection in the event of non-payment was bad in law. It is clear that according to s. 38(3) of the Act, TNB is entitled to require the consumer to pay for the loss of revenue and any expenses incurred by TNB as a result of the meter tampering.

Section 38(3) provides as follows:

> (3) The licensee may require the consumer to pay him for the loss of revenue due to the offence committed under section 37(1), 37(3) and 37(14) and any expenses incurred by the licensee under this section including expenses incurred in respect of the reconnection of electricity supply.

[28] Thus, the Act does not limit the right of TNB to claim the amount owing only through civil proceedings in court. Alternatively, the Act empowers TNB to claim for loss of revenue by way of a civil action in court pursuant to s. 38(5) of the Act which provides as follows:

> (5) The amount stated in the written statement shall, within the period specified in the statement, be due and payable to the licensee and in default of payment such amount shall be recoverable by civil action in a court.

Our Decision

[29] After a careful consideration of learned counsel's written and oral submissions, the records of appeal as well as relevant authorities, we are of the unanimous opinion that the learned JC had not erred in his findings and decision. We therefore dismissed the appeal with costs and affirmed the decision of the learned JC. The grounds of our decision are stated below.

[30] The primary issue for our consideration is the interpretation of the powers of TNB pursuant to the Electricity Supply Act 1990, ("the Act") in particular in respect of TNB's powers to disconnect the supply of electricity and to claim payment of outstanding charges due as a consequence of under billing as a result of tampering of the meter which records consumption of electricity.

Disconnection Of Electricity Supply

[31] In respect of TNB's power to disconnect the supply of electricity, s. 38(1) of the Act provides as follows:

> Where any person employed by a licensee finds upon any premises evidence which in his opinion proves that an offence has been committed under section 37(1), 37(3), or 37(14), the licensee or any person duly authorized by the licensee may, upon giving not less than twenty-four-hours' notice, in such form as may be prescribed, cause the supply of electricity to be disconnected from the said premises.

[32] Although s. 38(1) empowers TNB to disconnect electricity supply, it must be emphasised that in s. 38(2) of the Act, the disconnection of electricity by TNB shall not exceed three months. A reading of both ss. 38(1) and 38(3) demonstrate that the power given to TNB by s. 38(1) is to limit any loss suffered by TNB by an underbilling of electricity consumption. In the present case, there was no issue of further losses as TNB had already replaced the alleged tampered meter three months prior to the issuance of the statutory notice of disconnection and the notice of demand.

[33] The question posed before us is whether a literal or purposive approach should be taken in interpreting the abovementioned provision. It was contended by the defendant that the plain and unambiguous meaning should prevail. The section provides power to TNB to disconnect the supply of electricity on fulfilment of only two prerequisites: one, a subjective finding by a TNB representative that an offence has been committed (eg, meter tampering) and two, issuing a notice to that effect, such notice to be effective not less than 24 hours.

[34] We are of the view that the learned JC had correctly construed s. 38(1) and 38(3) of the Act by adopting the purposive approach whereby the purpose and intent of the Act shall be considered in construing the meaning of the provisions of the Act. In the instant case, there has been no offence committed after three months of replacement of the tampered meter. Thus, the defendant has no authority to disconnect electricity supply or to terminate electricity supply in the event payment of RM1,000,350.98 is not made within 24 hours of the issuance of notice. Sections 38(1) and 38(3) of the Act does not authorise TNB to do so.

[35] The use of the purposive approach in the interpretation of Acts is accepted by virtue of s. 17A of the Interpretation Acts 1948 and 1967. This approach is further supported by the Federal Court and Court of Appeal in the following cases.

[36] In the case of *Tenaga Nasional Bhd v. Ong See Teong & Anor* [2010] 2 CLJ 1; [2010]2 MLJ 155, Augustine Paul FCJ in interpreting the meaning of the phrase, 'upgrading' in s. 13 of the Electricity Supply Act 1990 ('the Act') had emphasised that what must prevail is a construction that will promote the purpose of the Act.

[37] In the case of *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Berhad* [2012] 4 CLJ 478, where the facts disclose an occasion of meter tampering, the Federal Court agreed with the Court of Appeal that s. 38(1) of the Act was enacted to give effective powers to TNB to instantly prevent any offence that may be committed. It provides specifically for the preservation of TNB's interests and empowers TNB to act expeditiously to prevent theft of electricity.

[38] We agree with the learned JC's view that in construing the abovementioned section, one must go beyond the plain and literal meaning therein and consider the purpose of the abovementioned section in order that the purpose for which the section was enacted is achieved. On this score, the

A contention is that the power given to TNB to disconnect the supply of electricity in circumstances where an offence has been committed is to prevent further losses to TNB. Thus, the short notice of 24 hours' notice underscores the urgency for TNB to take the drastic action of disconnecting electricity supply.

B **[39]** Section 38(2) stipulates that even in circumstances where TNB is empowered to disconnect the supply of electricity, the period of disconnection is expressly limited to a period not in excess of three months.

[40] In the event that TNB has already halted any further potential losses by rectification of the defective meter or installation of a new meter, the C purpose ie, to prevent further losses to TNB has already been achieved. What then does TNB seek to achieve by taking action to disconnect electricity supply? The answer that comes to mind is to punish the errant consumer and perhaps as a deterrent to the consumer as well as other likeminded consumers who may be tempted to commit such offences.

D **[41]** It seems to us that for TNB to take the abovementioned approach is entirely inconsistent with the objective of the Act which provides as follows:

> An Act to provide for the regulation of the electricity supply industry, the supply of electricity at reasonable prices, the licensing of any electrical E installation, the control of any electrical installation, plant and equipment with respect to matters relating to the safety of persons and the efficient use of electricity and for purposes connected therewith.

[42] It is trite that electricity is a basic necessity and thus any disruption of electricity supply would result in adverse, even dire consequences for the F consumer. Great personal and economic hardships are caused by a prolonged disruption of electricity supply. The instant case is an example in point. The respondent operates a hotel, in which the continued supply of electricity is a necessity. Any disruption in electricity supply, particularly a prolonged disruption would lead to losses in business as well as potential lawsuits by the hotel's customers.

G **[43]** Thus, we are of the view that a literal approach is inconsistent with the purpose of the Act and would lead to adverse economic consequences which is not within the contemplation of the Act.

Recovery Of Outstanding Amount For Electricity Usage

H **[44]** The second issue raised in the O. 14A application in the High Court is whether TNB is required to prove its claim by a civil action in court, or is TNB empowered to use the threat of a disconnection of electricity supply to extract payment in circumstances where an offence has been committed?

I **[45]** We are not persuaded by the position taken by TNB for the following reasons. If TNB's contention is accepted, it would mean that the purpose of a disconnection of electricity supply under the Act goes beyond arresting potential future losses of revenue to TNB and is extended to punish errant consumers who commit offences as well as a threat by TNB to compel such

consumers to pay outstanding sums without the necessity of instituting a civil action in court. We find this inconsistent with the express and clear provisions of the Act.

[46] The notice of demand issued under s. 38(3) of the Act is bad in law in that the sole purpose of its issuance was to threaten the plaintiff that electricity supply will be terminated in the event the amount claimed by TNB is not paid within 24 hours. This was never intended by the Act which requires a civil action to be brought for payment (s. 38(5) of the Act). Therefore, TNB's notice is bad in law.

[47] Pursuant to the Act, TNB is empowered to claim for loss of revenue by way of a civil action in court pursuant to s. 38(5) of the Act which provides as follows:

> (5) The amount stated in the written statement shall, within the period specified in the statement, be due and payable to the licensee and in default of payment such amount shall be recoverable by civil action in a court.

[48] The above provision clearly stipulates that a default in the amount due and payable to TNB caused by the commission of an offence would entitle TNB to recover the outstanding amount by a civil action in court. Nowhere in the Act, either expressly or by inference can TNB utilise the threat or action of disconnection of electricity to compel a defaulting consumer to pay the outstanding sum. Thus, we are of the considered view that TNB's notice of disconnection of electricity to compel the payment of outstanding sums due is bad in law and thus invalid.

[49] If we were to accept the defendant's interpretation, the effect would be to further extend TNB's powers under the Act in the following ways. Whenever there are outstanding electricity bills, TNB may, by giving a 24-hour notice to the delinquent customer threaten to and act to disconnect the supply of electricity if the customer defaults in payment within the stipulated time. There is no necessity for TNB to prove the quantum of its claim by a civil action in court. Thus, theoretically, a customer is not afforded the opportunity to allege that there could be a miscalculation or that there is an error in the reading or that the amount claimed is inaccurate or excessive. Recourse to prove its claim by civil action is only an option that TNB in its sole discretion may exercise. In addition, TNB may also threaten to and disconnect electricity if in its subjective opinion the meter has been tampered with, irrespective of whether the tampered meter has been replaced or rectified. In this respect, the purpose of the disconnection of electricity is not to arrest future losses to TNB but to punish the consumer for the default in the payment of outstanding electricity charges or, in TNB's subjective opinion, an offence has been committed.

[50] With all due respect, we are unable to agree with the above interpretation that the extensive powers abovementioned given to TNB is consistent with the intention and purpose of the Legislature and accords with

economic efficiency in the provision of electricity supply. On the contrary, electricity being a basic necessity and the lifeblood of businesses, untrammelled powers to disconnect electricity would be adverse to and detrimental to businesses.

[51] We were particularly troubled by the extensive and untrammelled powers accorded to TNB by the abovementioned interpretation, which appears to extend beyond what is statutorily provided for under the Act. As it stands, TNB is given the power to disconnect electricity supply if in its subjective opinion, there has been a commission of an offence causing TNB a loss in revenue. The maximum duration of the disconnection is a period of three months. TNB may, on the basis of its own calculation, issue a demand to recover the outstanding monies owed. In the event that the consumer defaults, TNB may recover the amount in a civil action in court. A conviction is not necessary for TNB to pursue a claim under s. 38(3) to (5) of the Act.

[52] From the foregoing, it appears to us that TNB has been accorded with sufficiently wide powers consistent with the purpose of the Act. To extend TNB's powers beyond the above would be neither necessary to protect TNB's interests nor beneficial in economic terms.

[53] In addition, if the above interpretation is taken, it would appear that TNB is at liberty to circumvent the express and clear provisions of s. 38(5) of the Act which provides that on default of payment due, "such amount shall be recoverable by civil action in a court."

[54] To summarise our position on the first and second issues: We agree with the decision of the learned JC on both issues raised in the O. 14A application. On the first issue, we agree that once a tampered meter has been rectified, TNB is not empowered to issue a notice of disconnection as the purpose of the disconnection is to arrest future loss of revenue to TNB. Since the meter has been replaced or rectified, TNB is not at risk of future losses. In respect of the second issue, when an offence has been committed, TNB is not empowered to issue a notice of disconnection to compel payment of outstanding monies. Recovery of such monies shall be by a civil action in court.

[55] For all the reasons stated above, we dismissed the appeal before us with costs and affirmed the decision of the learned JC.

[56] Since our decision given on 27 April 2016, Lim Yee Lan Judge has retired. This judgment is therefore prepared in accordance with s. 42 of the Courts of Judicature Act 1964.